trustee at or after the time when the trust came into existence, that is, the time of the conversion, should be required. However, it seems that relief should be given in this case on the broad ground of unjust enrichment, rather than by enforcing the trust; that the plaintiff is out and the defendant is in, and that this is inequitable. See 26 HARV. L. REV. 661. Even in cases of oral trusts to hold land for the benefit of the grantor, Massachusetts, though denying recovery of the land, has permitted recovery of its fair value, and this remedy would seem adequate in the principal case. *Twomey* v. *Crowley*, 137 Mass. 184; *Cromwell* v. *Norton*, 193 Mass. 291, 79 N. E. 433.

BOOK REVIEWS

A TREATISE ON THE POWER OF TAXATION, STATE AND FEDERAL, IN THE UNITED STATES. By Frederick N. Judson. St. Louis: The F. H. Thomas Book Company. 1917. pp. xxx, 1144.

"Judson on Taxation" has become the standard book upon its narrow subject — narrow, because only questions involving the legal power to tax are considered, and those questions are all assumed to be based upon the Constitution of the United States. Within this narrow field the author covered his ground to the satisfaction of the profession; the book was needed, it was adequate, and the second edition, after fifteen years, will be welcomed. In this second edition one new chapter has been added, entitled "Enforcements of Limitations upon Federal Taxation;" about one hundred sections have been added to the other chapters, and about four hundred new cases have been cited. The new matter bears marks of Mr. Judson's terse and accurate style, and brings the text down to date. One might wish that the very important decision of *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194, had received fuller consideration, instead of being dismissed with two brief paragraphs giving its gist, and that in this fuller consideration the author had compared it with the cases of *New York Central R. R.* v. *Miller*, 202 U. S. 584, and *Southern Pacific Co.* v. *Kentucky*, 222 U. S. 63, by which its scope is certainly limited. Here, as now and then in other cases, the author errs on the side of brevity, a failing which the profession, groaning under the dreary length of type-writer-manufactured books, will pardon. Every independent opinion of Mr. Judson's on this difficult subject is helpful and authoritative. We wish he had given us more of them, but we are grateful for those he has given us.

JOSEPH HENRY BEALE.

SCIENCE OF LEGAL METHOD: SELECT ESSAYS BY VARIOUS AUTHORS. Translations by Ernest Bruncken and Layton B. Register. Introductions by Henry N. Sheldon and by John W. Salmond. Modern Legal Philosophy Series. Volume IX. Boston: The Boston Book Company. 1917. pp. lxxxvi, 593.

To meet with an ungrudging, and even enthusiastic, acknowledgment that philosophy is the indispensable foundation of intelligent life and action, is for a present-day philosopher an experience sufficiently rare to be wholly delightful. But it is positively thrilling to meet with such an acknowledgment on the part of the leaders of a profession which is distinguished equally for its learning and subtlety, and for its practical shrewdness and hard-headedness. It must have been the desire to refresh the parched soul of a philosophical colleague with

this thrill which moved the review editor to entrust the reviewing of "The Science of Legal Method," not to a lawyer who might have judged it from his own experience as an expert, but to a mere philosopher, who can judge it only as a layman and an outsider. Fortunately the task of giving an opinion on a book containing selections from the writings of such men as François Gény, Eugen Ehrlich, Johann Georg Gmelin, Géza Kiss, Fritz Berolzheimer, Josef Kohler, Roscoe Pound, Heinrich B. Gerland, Édouard Lambert, Karl Georg Wurzel, Alexandre Alvarez, Ernst Freund, is less embarrassing than it might have proved, because the Editorial Committee for the series has not only supplied an admirable editorial preface, the joint work of Professors John H. Wigmore and Albert Kocourek, both of Northwestern University, but it has also induced Mr. H. N. Sheldon, a former justice of the Supreme Judicial Court of Massachusetts, and Mr. John W. Salmond, Solicitor-General for New Zealand, to write each a special introduction. Between them, these four authorities supply all that one could possibly ask for in the shape of a review of the book from a lawyer's point of view. It is really a most ingenious and admirable plan for the editors and introducers to eliminate the professional reviewers by doing their work for them far more competently than ninety-nine out of one hundred of them could conceivably have done it themselves. It is safe to say that any student of law who takes the trouble to master especially the editorial preface (pages xxi-lxvii) will find himself splendidly prepared for appreciating intelligently what is to be said for and against the method of "free judicial decision;" or what is the function respectively of legislator and judge; what are the data, the methods, the aims of juridical thinking. This, happily, being so, the philosopher-reviewer can, with a good conscience, keep out of the lion's den of legal experts, and, peeping safely through the bars, confine himself to some observations on the logical and philosophical aspects of their behavior.

As a student of logic, I am above all interested in what our authors have to say concerning the logic of juridical thinking. Their common problem is to determine the method of thinking which will yield the best results in terms of "substantial justice" and "social utility." They are engaged in a vigorous effort to shake off the fetters of traditional formalism, and to adopt a freer, more elastic method, which will better secure the ends of justice in the complex and ever-changing tissue of modern life. But what strikes a logician as most curious is that this movement of challenge and reconstruction should take the form of an attack on "logic." There is surely a strange paradox here, is there not? On the one hand, all our authors are clearly agreed that work so delicate and fraught with consequences so far reaching for human welfare as the making and administering of laws, demands reasoning powers of the very highest order. In other words, the kind of thinking required must, so one would expect, be in the highest degree logical. But, on the other hand, there runs through most of these essays a remarkable distrust and depreciation of logic. Gény recommends the lawyer to realize that the elements of every system of positive law "are not logical entities, but those ethical and economic realities which alone can give us an insight into the effective forces of social life" (page 42). Ehrlich, after his fashion, is refreshingly vigorous: "Of all the gifts of the human intellect, logical acumen is the least fruitful. There is profound wisdom in the fact that German legend frequently portrays the devil as a sharp dialectician" (page 84). Gmelin inveighs against those who "care everything for formal logic and nothing for the sense of justice" (page 140). Kiss contrasts the Roman idea of "*aequitas*" which kept the interpretation of the law plastic, with the "degenerate" scholastic application of it by "formal dialectic logic" (pages 154 *et seq.*). Berolzheimer calls for emancipation from "the letter of the law" (page 167). Such an authority as Dean Pound declares, "application of law must involve not logic merely but a measure of

discretion as well," and he adds that the law cannot be made "purely mechanical in its operation" (page 208). Wurzel records the appearance at the present time of the postulate that juridical thinking is "to have even the courage of being illogical" (page 297). He claims to be "substituting for the purely logical a dynamic or psychological point of view" (page 358), and, in doing so, to be in line with a reform movement in the science of logic, as the leaders of which he names Erdmann, Sigwart, and Wundt.

Well, if logic goes, what is to take its place? Various are the suggestions. "We need a process of reasoning which starts from an intuition supplemented by the feeling for what is just, and arrives at exact conclusions by a series of deductions under the constant guidance and control of practical commonsense," says Gény (page 17). Ehrlich, after a vehement outburst against "legal technicalism" as "nothing less than the sin against the Holy Ghost" (page 65), declares that "a legal rule must be treated not like a rigid dogma but like living energy" (page 77), and that "there is no guaranty of justice except the personality of the judge" (page 65). He calls for "the element of creative thought" supplied by "great individual minds" (page 74). Gmelin would rely on an innate "sense of justice," strengthened by practice and training. Others speak of "legal tact," "discretion," and so forth, notwithstanding the complaints of their critics, that this is to open the door to arbitrary whim, emotionalism, subjectivism, individualism, and a host of other abusive-isms.

Now this whole dissatisfaction with logic, these appeals to psychology, sociology, creative thought, sense of justice, and what not, are not only a sign of the times, but, in my opinion, one of the most promising signs. They are typical of a general movement of self-criticism and reform, of which, perhaps, the extremest expression is Bergson's depreciation of the "intellect" as abstract, static, mechanical, repetitive in its workings, by contrast with the concrete, dynamic, alive, creative character of "intuition." What is called "pragmatism" is another form of the same movement, full, especially in the writings of William James, of the same impatience with logic, the same healthy appetite for the concrete; full, especially in the writings of John Dewey, of the same desire to make thinking an instrument of social welfare. Like many other students of philosophy, I welcome whatever is emancipating and constructive in this movement, because I firmly believe it will end by reëstablishing the contact, largely broken during the second half of the nineteenth century, especially in Germany, between the methods of thinking which yield the best results in science and law, and the logical theory of the Kantian and Hegelian schools, which Professor Kocourek in the preface happily characterizes as "realistic idealism" (page lvi). This is not an invitation to *jurare in verba magistri*, to set up Hegel's logic as another infallible dogma, not to be criticized, only to be reverently repeated like a magic charm for the salvation of one's philosophical soul. But it is an invitation to remember that the antithesis of "formal logic" and "creative thought," of "intellect" and "intuition," is precisely the same antithesis which Kant and Hegel discussed in terms of the contrast between "understanding" and "reason." It is a reminder that the logicians who have learned in the school of the great idealists, have always conceived the movements of thought as no less concrete, flexible, dynamic, yes, and experimental, than the movements of life itself.

In short, our authors cry out against logic in general, because they find lawyers practising and preaching bad logic, and are unaware of the existence of a better. Hence, having an inadequate concept of logic, they are driven to calling the better thinking, which they desire, "illogical." This treatment calls from a logician for two comments. (*a*) In the first place, the student of logic must decline to be held responsible for faults of method which are wholly due to mistaken concepts of the functions of laws and lawyers, apparently still

prevailing among the legal profession. Witness the startling confession in the preface: "Philosophy of law has been to us almost a meaningless and alien phrase" (page vi). Suppose it true that often, as Gmelin says, "decisions are based on doubtful arguments drawn from the letter of the statute or an artificial, abstract deduction, while reasonable inferences from the concrete facts, equity, and the subjective sense of justice were neglected" (page 122). What logician ever demanded of a lawyer a procedure yielding artificial, unreasonable, unjust results? It is the lawyer, not the logician, who has insisted on treating statutes as sacrosanct, absolute, unchanging, and on torturing the ever novel, ever changing forms of social and industrial life into a strait-jacket of concepts and rules, which are not only treated as rigid and fixed, but which may even, like the Roman law, have been taken over from a very different type of civilization. It is the lawyer, not the logician, who has elevated faithfulness to the letter of a statute, or to the hypothetical intention of an ancient legislator, to the dignity of an ideal, regardless of the effects of such interpretation on "substantial justice" and "social utility." There is no logic known to me which forbids the recognition that "legal systems do and must grow, that legal principles are not absolute, but are relative to time and place" (Pound, page 207); or which demands the ignoring of the connection between law and economics, and compels the lawyer to apply the law of property of a non-industrial age so as to justify the "economic exploitation of the working class under the yoke of capitalism" (Berolzheimer, page 181). I have the most lively sympathy with the vigorous demands for less of the letter of the law and more of the spirit of justice which breathes through these essays, but the remedy for the acknowledged defects of the present attitude and method is, not to enthrone the "courage to be illogical" in the place of logic, but to abandon a worse logic for a better.

But (*b*) what makes the difference, in the sense here intended, between "bad" logic and "good" logic? Between the kind of thinking that is rightly denounced as formalism, logic-chopping, hairsplitting, "squeezing decisions out of a statute with a hydraulic press" (Ehrlich, page 76), and the kind of thinking which our authors seek to secure by the "free decision" of the judge, by the introduction of historical, sociological, psychological considerations? *The difference is material, not formal.* Formally, thinking is good or bad, according as the conclusion does, or does not, follow from the premises. Materially, thinking is good or bad, according as the premises from which conclusions are drawn are more or less complete as measured by the whole range of the problem, or more or less relevant to the task and the purpose in hand. What our authors criticize as bad logic is really bad premises, not a faulty technique in deducing conclusions, but a faulty subject-matter, — what I described above as a mistaken concept of the function of laws and lawyers, expressing itself in trickiness of "interpretation," the devices and make-believes necessary for twisting the terms of a statute so as to apply to novel situations, the abstractness and rigidity of legal formulas, which, artificially tied down to the legislator's "intention," and therefore to the forms of social life of the legislator's experience, inevitably lag behind the mobility and fluidity of actual life. What our authors call for, and seek to secure, is better premises, a fuller and completer range of *material* considerations out of which to elicit "substantial justice." That this is the real character of the desired logical reform in juridical thinking is easily illustrated. Thus Professor Wigmore, in his section of the Editorial Preface, speaks of the "unlimited opportunity and necessity for the judiciary to reconstruct the thought (of a statute) by its own standard of experience, which may and must often differ from that of the legislator" (page xxxv). He refers with approval to the way in which courts rely on considerations of "public policy" in reaching their verdicts (page xl). Professor Kocourek points out that "the law is a dead letter

unless 'it works'; and it will not work unless and until it is adjusted to the material and psychic conditions of the society in which it is to operate" (page lvii). Gény preaches throughout from the text that courts should be guided by considering "the nature of things," and that, in order to do this, they should avail themselves of individual and social psychology, "statistics and every other means of learning social facts, as well as ethical, political, and economic considerations" (page 35). Ehrlich is full of the thought of "social evolution" and the "legal revolutions" which accompany it, as when "before our eyes, the matrimonial relation is turning from a relation of dominion of a man over a woman into an association of two individuals of equal importance and equal rights" (page 57). He is almost too Heracleitean when he declares that law "is really antiquated the very moment it has been formulated" (page 61), though his real point is sound, *viz.*, that legal thought should reflect the great intellectual and social movements of the time. Gmelin's "subjective sense of justice" is explicitly instructed to seek support in such "material factors" as actual human rights, interests, needs, habits, opinions. Berolzheimer contrasts the fiction of an absolute Law of Nature with "the Law of Civilization which is relative" (page 178), *viz.*, relative to the concrete social and economic conditions of each age. For Kohler, the sociological method requires us to look upon laws as "products of the entire people of which the legislator was but the organ" (page 189). "A statute," he goes on to say, "in truth is nothing but a way of bettering conditions, an instrument for attaining certain human ends, for promoting civilization, for repressing whatever factors are inimical to progress, and for developing the powers of the nation" (pages 192–93). Pound reminds us "that the lawmaker is the man of his time, thoroughly saturated with the thoughts of his time, thoroughly filled with the culture that surrounds him, that he works with the views and conceptions which are drawn from his sphere of culture . . ." (page 224), a view which is the lawmaker's charter of emancipation from the trammels of the past for constructive work in the present. Wurzel lays his finger on the point when, in a brilliant footnote (page 295), he remarks that "Method is not a purely formal law of thought . . . for instance, by choosing for linguistic or economic investigations either the historical, statistical, organic, or some other method, one betrays at once the point of view from which one looks at these things, and will arrive at different results accordingly." Wurzel's whole very able essay is one sustained effort to make legislators and judges aware of the extent to which their thinking at every step is, and ought to be, determined by material considerations; how even when they appear to be merely subsuming facts under a legal rule, their thinking is determined "by general social phenomena, in brief, the entire fabric of society" (page 384); how it consists of "estimating the character of the facts with the aid of the whole conception, ethical, economic, social, and otherwise, which the judge has of human life" (page 408). Yet his clear perception of this fact does not prevent him from seeing also why the fiction that nothing enters into a decision except the facts and a legal rule meets a social want (page 418).

At bottom, then, if I am right, the problem of "free decision," and of the judge's law-making influence exercised through skilful "interpretation" of statutes, or through ingenious extension of precedents in case-law, is a problem of material logic, so to speak. The solution depends on what view we take of the function of a judge, the nature of the law in relation to the life of society, and of the factors which ought to be considered, if concrete justice is to be secured in each particular case. Different views on these points yield different conclusions, *i. e.*, different philosophies of law. No logician can legislate for the lawyer on such material points. He cannot, *ab extra*, dictate what is relevant and what is irrelevant. These are questions which must be settled, and are settled, experimentally, by trial and error, — the experiments being on a

vast social scale, and involving the stability and welfare of nations. But sound logic will always support, in the very name of that "reason" to which all our authors appeal, the methods of that thinking which surrenders itself to the "logic of facts" and also, what in the law is of even greater importance, to the "logic of ideals"; which learns by experience, and relies on the concretest possible grasp of, and acquaintance with, the range of relevant subject-matter, instead of following merely abstract general rules. If this be true, then Ehrlich is surely right when he claims for the ideal judge qualities which remind one of the philosopher-king of Plato's Republic: "a standard of mental and moral greatness far above the common average" (page 66). And so are the Editors right when they lay it down that "philosophers must become lawyers or lawyers philosophers, if our law is ever to be advanced to its perfect working" (page v). Legal education in this country could render no greater service to the community than by inspiring the coming generations of lawyers with the ambition to practise their profession with something of this largeness of outlook.

R. F. ALFRED HOERNLÉ.